



## Santa Clara Law Review

---

Volume 2 | Number 2

Article 6

---

1-1-1962

# The Role of a City Attorney

Ferdinand P. Palla

Follow this and additional works at: <http://digitalcommons.law.scu.edu/lawreview>



Part of the [Law Commons](#)

---

### Recommended Citation

Ferdinand P. Palla, *The Role of a City Attorney*, 2 SANTA CLARA LAWYER 171 (1962).

Available at: <http://digitalcommons.law.scu.edu/lawreview/vol2/iss2/6>

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact [sculawlibrarian@gmail.com](mailto:sculawlibrarian@gmail.com).

# The Role of a City Attorney

*Ferdinand P. Palla\**

It is not uncommon for the average citizen who has not attended city council meetings and who has had little, if any, direct contact with the office of city attorney to wonder and ask, "What does a city attorney do?" Unlike the office of district attorney or of public defender, the functions of a city attorney have not been widely glamorized. This is understandable since a city attorney's work, being primarily civil and technical in nature, cannot compare, in attracting the attention of the public, with spectacular murder trials or other like proceedings. Most people are aware, in a general fashion, that a city attorney gives legal advice to a city, and represents it in court litigation. Particular individuals will be more cognizant of those functions of a city attorney where they have been directly affected. Landowners who have had their property specially assessed, notwithstanding their protests, for the cost of street improvements may remember the city attorney as the person who advised the city council that such action was legally proper. Others may identify him as the person who helped the city annex their property over their protests. Some have heard that if one's neighbor is creating or maintaining an alleged nuisance such as chickens, barking dogs or children playing drums, the person to appeal to for aid is the city attorney. Also, of course, people who violate city ordinances may become suddenly cognizant of his role as a criminal prosecutor. The full scope of a city attorney's functions and problems, however, cannot be fully appreciated unless one has a thorough knowledge of municipal government, its problems, and of the laws relating to the same. No attempt will be made in this brief article to set forth the powers, duties, functions and responsibilities of municipal corporations. Such has been ably done in other publications.<sup>1</sup> It is hoped, however, that the following will provide a broader picture of a city attorney's role in municipal government than is ordinarily possessed by the general public.

The Government Code of the State of California provides that the city attorney of a general law city shall advise the city officials in all legal matters pertaining to city business, frame all ordinances and resolutions required by the legislative body, and perform other legal services required from time to time by the legislative body.<sup>2</sup> In charter cities, as distinguished from gen-

---

\* A.B. San Jose State, 1935; LL.B. University of California School of Jurisprudence, 1938; City Attorney, City of San Jose, California; member California State Bar.

<sup>1</sup> See generally, 34, 35 CAL. JUR. 2d.

<sup>2</sup> CAL. GOV. CODE §§ 41801-03.

eral law cities, the duties of a city attorney are usually set forth in the city charter. The charter of the City of San Jose, for example, in speaking of the city attorney, states:

He shall represent the City in all litigation, including the prosecution of criminal cases arising out of violation of city ordinances. He shall be the legal advisor of the council, the city manager, and all other officers, boards and departments of the City, and shall give his opinion in writing when requested by any officer or board. He shall draft all proposed ordinances, or resolutions, when requested to do so by the council, and perform such other duties as may be prescribed by ordinance.<sup>3</sup>

Although the duties of a city attorney vary in different cities, depending upon applicable charters and ordinances, the above sets forth, in general terms, the functions of most city attorneys. Let us consider, however, some of his specific duties.

#### INCORPORATION, ORGANIZATION AND ALTERATION OF CITY

A city attorney must always be ready and able to advise the city respecting its corporate structure and organization, ways and means of changing the same, procedures pursuant to which the city can be enlarged or diminished in size, and any and all other legal matters relating to its incorporation, adoption or amendment of charters, annexations, consolidations, exclusions and disincorporations. When directed, he must draft such changes as may be desired, together with resolutions, documents and other papers necessary to effect such changes. All cities in California, with one or two possible exceptions which are still operating under Acts of the State Legislature enacted prior to the adoption of the present state constitution, are either "general law cities" or "charter cities."<sup>4</sup> General law cities are incorporated pursuant to general laws adopted by the state legislature; they have only such powers as are *granted* to them by the legislature, and are subject to all limitations, substantive and procedural, imposed upon them by the legislature. Charter cities, on the other hand, are established pursuant to the state constitution, and derive their powers directly from the constitution rather than from the legislature. In the field of "municipal affairs," charter cities possess all powers which are not denied them by the constitution or the charter itself, and are not bound by general laws adopted by the state legislature. It is sometimes proposed that a general law city be reincorporated as a charter city; or that a charter city be reincorporated as a general law city; or that a charter city reincorporate itself under a new charter; or

---

<sup>3</sup> San Jose City Charter, § 55.

<sup>4</sup> CAL. CONST. art. XI, §§ 8, 8½.

that an existing charter be amended. All such proposals present legal questions which the city attorney must be able to answer. He must be ready to explain the differences between general law and charter cities; the powers, limitations and advantages of each; the procedures pursuant to which a city may be reincorporated; the legal effect of proposed charter changes; and the manner in which charters can be amended. He is expected to draft charter amendments and all documents required by amendment procedures. He may even be called upon to draft a completely new charter, although frequently, because of political issues involved in such matters, the drafting is sometimes delegated to a board of freeholders or to a citizens' committee. Even then, however, his opinion respecting the legal effect of specific provisions is often requested by city officials or others.

Frequently the matters under consideration are extremely technical and relate to specialized fields of law, such as franchises, retirement plans, revenue bonds, etc. The city attorney is expected to be an expert in all fields of law; if he does not have the requisite knowledge when a particular problem arises, he is expected to very quickly acquire it. Extreme care must, of course, be used in drafting charter changes. Errors or oversights can cause a city great damage, financial and otherwise.

#### ANNEXATION

One of the most important problems facing cities in California today is the matter of annexations. Because of the tremendous increase in population in post-war years and the resultant urbanization of what were formerly rural areas, there has arisen an urgent need to expand and extend to newly developed areas certain municipal-type services, such as streets, sidewalks, curbs, gutters, sanitary sewers, storm drainage systems, firehouses, fire alarm and fire-fighting facilities, municipal-type police service, parks and playgrounds, etc.

County governments often are unable or unwilling to provide such services. Frequently, politically independent districts, such as fire protection districts, sanitation or sewer districts, recreation districts, lighting districts, and a multitude of other special improvement districts, are established to provide certain special services. This, however, has resulted in the establishment of a complex system of overlapping independent governments, each having independent governing bodies and independent powers of taxation, often working at cross purposes with little, if any, central planning and control.

The results have been far from satisfactory; regional problems cannot be solved without some regional control. Since cities are very seriously affected

by the kind of development fostered in areas adjoining their boundaries, many have sought to control the above by extending their boundaries to include the newly urbanized areas. This, in turn, has resulted both in annexation strife between cities and property-owners, and in inter-city annexation rivalry.

The city attorney is frequently in the middle of such controversies. He is called upon to provide an infallible annexation procedure for his city which will comply with all applicable state laws,<sup>5</sup> which will withstand legal attack from other cities or from other annexation opponents, and which will enable his particular city to quickly and efficiently annex adjoining territory — always at least one jump ahead of other cities. He must draft all forms and documents required by annexation procedures, including petitions, resolutions, ordinances, protests, notices and affidavits. He must constantly advise the city legislative body and other city officers with respect to the legal propriety or illegality of their actions or proposed actions in connection with such annexations.

He represents the city in all litigation instituted to contest city annexations. Occasionally, he must contest, in the proper courts, the validity of annexations instituted by neighboring cities, or institute legal proceedings to contest the incorporation of adjoining territory which his city might prefer to annex. In all such litigation, frequent use is made of the extraordinary writs, such as certiorari, mandamus, and quo warranto. He must be familiar with the law pertaining to each and their proper application. In all such matters, of course, he does not stand alone, but works closely with other city departments concerned in the matter.

He is expected to be liberal and to take reasonable risks if necessary; undue conservatism may result in other cities annexing all available territory. But he is also expected to win if his city's annexations are contested in court.

The annexation laws of California for years have been grossly inadequate. They were not originally drafted in contemplation of a situation such as has developed in this state in the post-war years. They have been replete with uncertainties, ambiguities and omissions. Much bitter annexation litigation has resulted.

As issues are resolved by the appellate courts, new piecemeal amendments adopted by the legislature create new ones. In advising city officers respecting annexations, the city attorney must do his utmost to help the city accomplish its annexation aims; that is one of his jobs; but he must also continuously use care not to let the exuberance and desires of his fellow

---

<sup>5</sup> E.g., CAL. CONST. art. XI, § 7½b; CAL. GOV. CODE §§ 35008, 35305-11.

city officers cause him to approve procedures or actions which are clearly indefensible or illegal. When necessary, he should and does advise his city council that a particular annexation proceeding is illegal and void and must be dropped. Such action is seldom if ever resented provided, of course, he fully cooperates with the city in attempting to expand the city and does not restrict his activities to merely saying, "No, you cannot do that."

#### POWERS, DUTIES AND RESPONSIBILITIES OF CITY

Cities generally are established for the purpose of providing to their inhabitants those municipal-type services which counties are unable or unwilling to provide. Such services include, but are not limited to, police and fire protection, street improvements, sanitary sewers, storm drainage systems, parks and playgrounds, public health services, libraries, auditoriums, planning services, land-use regulations, airports, public utility services, and traffic control.

A city's powers are extensive, but by no means without limitation. The city attorney must know what those powers are and their limitations. He must also be familiar with the procedures pursuant to which they may be executed. He is required to draft such ordinances, resolutions, regulations, contracts and other documents, and take other legal action as may be necessary for the efficient execution of such powers. When court action is necessary, he must institute and conduct such proceedings. He advises the city with respect to such matters. Numerous requests for legal opinions are received and processed by him.

Frequently, his answers will determine whether a particular public improvement will or will not be constructed, or may involve the saving or expenditure of large sums of money by the city, or may otherwise seriously affect the general public in its personal activities, its business or its pocket-book. Needless to say, decisions in such matters cannot be made lightly, but must be based on and supported by sound principles of law.

Cities are usually divided into departments. Each department has its own peculiar problems. The planning department is concerned with the extent of its legal powers respecting planning and zoning of property, and the requisite legal procedures therefor. The city attorney's advice and aid are sought both in the drafting of planning and zoning regulations and in their administration. The public works department is concerned with constructing and maintaining public improvements as quickly and efficiently as possible. Public works contracts must be drafted; bid procedures must be complied with; specifications must be reviewed for legal adequacy; faithful performance bonds, labor and material bonds, and insurance policies must

be required and checked; regulations must be drafted, enacted and administered relating to use of the streets, the sanitary sewer system, the storm drainage system, the parks and playgrounds and other public property. The city attorney is expected to advise and give aid, and to draft all contracts, bonds, general specifications and regulations. The building department is concerned with building codes, plumbing codes, electrical codes, gas codes, refrigeration codes. Such codes must be prepared, adopted by ordinance, administered and enforced. The city attorney drafts such ordinances, renders advice respecting their administration, and aids in their enforcement. When necessary, court action is taken. The treasurer's department is charged with the responsibility of collecting taxes, keeping and investing funds, enforcing licensing requirements, etc. The city attorney's advice is sought as to how such moneys must be kept, and to what extent and in what securities they may be invested until needed for municipal purposes. The city auditor is charged with the responsibility of not expending any money unless such expenditure is properly authorized and is for a lawful municipal purpose. When in doubt as to the legality of a proposed expenditure, the city attorney's opinion is sought. The city clerk must keep city records; he also handles elections. When may he destroy certain records? What do the election laws require? Is a particular initiative, recall or referendum petition legally adequate? The city attorney is consulted. If election, petition or other forms are required, the city attorney is requested to draft them.

In addition to the above departments, there are others who seek advice and aid, including but not limited to the police department, the fire department, the personnel department, the airport department, the recreation department, the manager's department, the health department, the civil service commission, the planning commission, the library board, the human relations commission—each having its own special legal problems, and each frequently needing legal advice and aid from the city attorney.

#### FISCAL MATTERS

The ability of a city to carry out its functions depends in great measure upon its fiscal powers and revenues. The constitution provides that a city may not incur any indebtedness or liability in any manner for any purpose in any one year in excess of its income or revenue provided for that year, without the assent of two-thirds of its qualified electors voting at an election held for that purpose.<sup>6</sup> In other words, each year's income must pay each year's liability, unless the electors authorize the sale of general obligation

---

<sup>6</sup> CAL. CONST. art. XI, § 18.

bonds payable from revenues produced in future years. Careful budgeting is essential. Also, steps must be taken to insure adequate revenue.

The most common source of revenue is the property tax. Other sources of revenue are sales taxes, regulatory license fees, revenue license charges imposed on the privilege of transacting certain kinds of businesses, grants from the state or federal governments for certain projects, and the like. Such revenues, however, do not arise automatically. Ordinances must be drafted and adopted imposing such taxes or charges. There are then problems of assessment, equalization and collection. Legal procedures or requirements imposed by the constitution or other laws must be complied with. License measures must be carefully scrutinized to ascertain whether they exceed the powers of a city. The city attorney's advice is often requested, and he is required to draft such measures. He is also required to defend the same against attack in court.

Frequently, a city's annual revenues are inadequate to pay for all expenditures which a city proposes to make. New sources of immediate revenue must be sought. An election may be called for authorization to sell general obligation bonds. This necessitates the drafting of a bond resolution, of a resolution calling an election, of a resolution establishing polling places and precincts and appointing election officers, and of notices and other documents essential to the calling and holding of such an election.

If a general obligation bond measure fails or is otherwise inadequate, a proposal may be made for the issuance of revenue bonds payable only from specified revenues of a specified project. May revenue bonds be issued for the purpose contemplated? May the specified revenues be legally pledged to pay off such bonds? Must the electors approve the issuance of such bonds at an election called for such purpose? If so, what vote is required? The city attorney is expected to have the answers.

If the above measures are inadequate or for some reason are disapproved, the city may contemplate constructing some improvement, such as a new city hall, a sewage treatment plant, or other project, pursuant to a "lease-purchase" type of contract. A lease-purchase type of agreement is one in which private parties construct, at their own expense, the desired improvement, and then lease the same to the city for a long term of years, but give to the city an option to buy the same in future years at a specified price. Sometimes, such contracts provide that the city become owner of the improvement, after paying rent for a specified term, without paying any additional moneys. Is such an agreement an illegal subterfuge calculated to enable the city to incur an indebtedness payable out of future years' revenues in violation of the debt limitation provisions of the constitution? It may



or may not be, depending upon the particular terms of the agreement and upon whether the rental required to be paid is the reasonable rental value of the improvement or is actually a part payment of principal. A city attorney is called for advice and to draft any desired documents. His advice, in such cases, should not be restricted to merely disapproving a proposed measure or contract, but he should advise and help the city in ascertaining what are legally proper methods of financing needed public improvements. This, in fact, is one of his more important functions.

A city not only has the problem of balancing its year's revenues with its year's expenditures, but it must also have enough money at all times during a year to enable it to carry on its business. A city's fiscal year usually, but not always, runs from July 1 to June 30. Its property tax revenues are not generally received, however, until December. It cannot, however, discontinue business between July and December pending receipt of property tax income. Occasionally other revenues on hand are inadequate to finance this "dry" period. What does a city do in such case? Again, the city attorney is consulted. He advises the city how it may sell tax anticipation warrants payable out of the next tax revenues of the year. He points out the limitations on this privilege. He explains the procedure required by law and drafts, if requested, all necessary documents and papers.

Other fiscal-legal problems and questions arise, too numerous to mention, yet all such questions must be answered by the city attorney without unreasonable delay.

#### LITIGATION

The city attorney's work is not, of course, restricted to the giving of legal advice and the drafting of ordinances, resolutions, contracts and other legal documents. He must also defend the city, its officers and employees in suits and actions filed against them. In addition, he represents the city in such suits, actions or other legal proceedings as are initiated by the city. The nature and extent of such work will vary between cities, and will fluctuate from time to time in a particular city. The importance of the matters at issue will also vary extremely.

One case, such as an action to compel a large public utility to pay a franchise tax, may involve millions of dollars; another, such as an action to restrain the keeping of bees in a residential area, may be relatively unimportant to all except those who are subjected to the mercy of the bees.

As already noted, litigation is quite common in the field of annexations. Cities may annex territory to the extent and in the manner authorized by

state law.<sup>7</sup> If a city proceeds under the wrong act or fails to comply with the procedure established by state law its proceedings may be declared void. A city attorney can best avoid trouble in this area by carefully supervising annexation proceedings while they are in process. It is often too late to correct material errors after the matter has gone to court, especially when another city has instituted proceedings to annex the same territory.

In rapidly expanding cities, the need for more and larger public works will require the acquisition of more and more land, or interests in land. Rights-of-way are needed for sanitary sewers, storm drainage systems and streets. More land must be acquired for various city projects such as city halls, firehouses, communication buildings, public health centers, libraries, public works yards, airports, public utility facilities, parks and playgrounds, garages and off-street parking facilities.

Most property is acquired by direct purchase under negotiated agreements. Frequently, however, where agreement cannot be reached as to price or other matters, or where there is no other way by which clear title may be obtained, proceedings in eminent domain must be instituted by the city attorney.<sup>8</sup> Each such action may involve one or a multitude of parcels. For example, where land is needed for the opening of a public street, the condemnation action would include all parcels, or parts thereof, through which the street is to be opened. Settlement and compromise of such actions, without proceeding to full trial, is quite common. Price is not always the sole issue. Such proceedings may be attacked on the ground that the proposed project is not a public purpose for which land may be condemned; or, when the land is situated outside the city, on the ground that the proposed improvements are not necessary, or not planned or located in the manner which will be most compatible with the greatest public good and the least private injury. Occasionally, suits in inverse condemnation are filed against the city to recover damage caused by a public improvement.

One of the biggest headaches facing cities today is tort liability. For years cities have assumed they possessed governmental immunity from tort liability for damages arising from governmental action, except to the extent liability was imposed by the State Public Liability Act<sup>9</sup> or other special laws. Recently, however, the doctrine of governmental immunity for cities has been upset by the courts. It is still uncertain what the ultimate effects will be. Under the Public Liability Act, a city is liable for damages caused by dangerous or defective conditions of public property if it had notice of the defect but failed to use reasonable care, after notice, to eliminate the

---

<sup>7</sup> CAL. GOV. CODE §§ 35008, 35305-11.

<sup>8</sup> CAL. CONST. art. I, §§ 14, 14½; CAL. CODE CIV. PROC. §§1238(3), 1239-40.

<sup>9</sup> CAL. CIV. CODE § 22.3.

hazardous condition.<sup>10</sup> Whether a particular condition is dangerous or defective is a question of fact usually given to a jury to decide. Juries are often liberal toward injured parties in such cases, notwithstanding instructions to the effect that a city is not an insurer and is not liable for minor defects. Also, the importance of the notice requirement has been greatly diminished by virtue of the courts' ruling that actual notice is not required; constructive notice is sufficient. Claims running into the millions of dollars are filed. Many involve minor alleged defects in streets and sidewalks. Cities often seek to cover themselves, either entirely or partly, by insurance; however, in larger cities, the cost of such insurance is often prohibitive.

Except where an insurance company undertakes the defense of a tort action pursuant to an insurance policy, the city attorney is usually called upon to represent the city in such matters. This requires investigative work as well as court action. Defense of such actions achieves greater and greater importance as cities expand and develop and the number and amount of claims increase.

Many other kinds of actions are occasionally filed. A building official may be sued for refusal to issue a building permit; civil service proceedings may be questioned; actions may be instituted relating to retirement rights; the constitutionality of an ordinance may be litigated; controversies may arise respecting recall, referendum or initiative; policemen may be accused of false arrest and imprisonment; action may be brought to compel the city auditor to pay certain obligations which he considers illegal or unauthorized; subdividers may attempt to compel the city to approve a certain subdivision map; and disputes may arise relating to the award, execution or performance of various kinds of contracts, bonds and other obligations.

Not only must the city attorney handle civil litigation, but he is usually also required to criminally prosecute persons who violate city ordinances. The charges may relate to violations of public peace measures, such as being drunk in a public place or in or about an auto, or may involve violations of building codes, zoning ordinances, health regulations, license requirements, traffic regulations, or other such ordinances. Although many such actions are relatively minor in importance, except to the individual directly affected, the great number of them impose considerable work upon the office of the city attorney. Their prosecution, however, is essential to the public health, safety and general welfare.

The foregoing illustrates only a part of a city attorney's functions. His activities extend to practically every area of city government. He is part of a team of city officers and employees, all working in close cooperation to most

---

<sup>10</sup> *Ibid.*

efficiently, fairly and legally carry out the aims and functions of municipal government. It is not his function to question the wisdom of a city's actions; but it is his duty to question their legality, and to explain ways and means by which city objectives may be legally accomplished. Frequently, he is called upon to give legal opinions respecting issues which are uncertain and unsettled. In such cases, he must give his honest and best opinion. City business cannot, and will not, always await a judicial determination.